## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

NO. 5:12-CV-592-FL

HEATHER L. SULLIVAN,	)	
Plaintiff,	)	
riamum,	)	
v.	)	ORDER
KIGHT'S MEDICAL CORP. and	)	
JOHN A. KIGHT,	)	
D ( 1 )	)	
Defendants.	)	

This matter comes before the court on the memorandum and recommendation ("M&R") of Magistrate Judge Robert B. Jones, Jr., pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), wherein it is recommended that the court deny the motion to dismiss for failure to state a claim brought by defendant John A. Kight ("Kight") (DE 22). No objections were filed, and the time to make objections to the M&R has expired. In this posture, the matter is ripe for ruling.

Plaintiff filed complaint on September 4, 2012, asserting the following five claims against defendant Kight and defendant Kight's Medical Corp.:

- 1. First Cause of Action wrongful discharge in violation of the Americans With Disabilities Act ("ADA").
- 2. Second Cause of Action retaliation in violation of the ADA.
- 3. Third Cause of Action violation of the Fair Labor Standards Act ("FLSA").
- 4. Fourth Cause of Action violation of the North Carolina Wage and Hour Act ("NCWHA").
- 5. Fifth Cause of Action wrongful discharge in violation of public policy.

(See Compl. ¶¶ 61-95). On November 30, 2012, defendant Kight moved to dismiss all claims brought against him, (DE 22), and defendant Kight's Medical Corp. filed an answer to the complaint. (DE 24). On April 26, 2013, the court entered a consent order of dismissal with prejudice, which stated that the parties consented to dismissal of the following claims as against defendant Kight individually: (1) First Cause of Action - wrongful discharge under the ADA, (2) Second Cause of Action - retaliation under the ADA, and (3) Fifth Cause of Action - wrongful discharge in violation of public policy. (DE 36 at 2).

As an initial matter, as noted in the M&R, the court notes there is a discrepancy in the conclusion paragraph of the consent order, which states in contrast to the above representation that plaintiff's First, Second, and Third causes of action against defendant Kight are dismissed with prejudice. (Id.) In accordance with the parties' stated intention regarding dismissal of the First, Second, and Fifth causes of action, in conjunction with the statement in the consent order that plaintiff does not consent to dismissal of her Third and Fourth causes of action, as confirmed in the M&R to which no objections were lodged, the court hereby AMENDS and CLARIFIES its April 25, 2013, consent order to state as follows in the concluding paragraph:

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's First Cause of Action, Second Cause of Action, and Fifth Cause of Action as against Defendant Kight individually are hereby dismissed with prejudice.

With respect to plaintiff's two remaining claims against defendant Kight individually, plaintiff's Third and Fourth cause of action under the FLSA and NCWHA, it was determined in the M&R that these claims should be allowed to proceed, where plaintiff sufficiently alleged facts establishing that defendant Kight is an "employer" for purposes of the FLSA and NCWHA. (M&R

5-8). As discussed more particularly in the M&R, this conclusion is supported by the factors set

forth by this court in Garcia v. Frog Island Seafood, Inc., 644 F. Supp. 2d 696, 707 (E.D.N.C. 2009).

Upon careful review of the M&R and of the record generally, having found no clear error, the court

hereby ADOPTS the recommendation of the magistrate judge (DE 37) as its own, and, for the

reasons stated therein, defendant Kight's motion to dismiss (DE 22) is DENIED.

In sum, plaintiff's claims asserted against defendant Kight's Medical Corp., and plaintiff's

Third and Fourth causes of action against defendant Kight individually, remain outstanding.

Deadlines and requirements for continued management of this case shall be maintained as set forth

in the court's March 13, 2013, case management order (DE 31).

SO ORDERED, this the 27th day of August, 2013.

LOUISE W. FLANAGAN

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United States District Judge